

J. Leary



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Transwestern Helicopters, Inc.

File: B-235187

Date: July 28, 1989

DIGEST

Protest that agency's failure to provide prior contractor with copy of solicitation resulted in a lack of full and open competition and rendered procurement fatally flawed is denied where, although agency inadvertently failed to solicit the protester it made reasonable efforts to publicize and distribute the solicitation and obtained adequate competition, as evidenced by receipt of 25 bids.

DECISION

Transwestern Helicopters, Inc., protests the award of a contract to any other firm under invitation for bids (IFB) No. R6-89-037, issued by the Forest Service, Department of Agriculture, for helicopter services in Region 6 (Oregon and Washington) for the 1989 season. Transwestern asserts that the requirement should be recompeted because, even though Transwestern was a prior contractor, the Forest Service did not provide the firm with a copy of the solicitation prior to the bid opening date. We deny the protest.

The requirement, for intermittent or "call-when-needed" (CWN) helicopter services, was synopsisized in the Commerce Business Daily (CBD) on January 10, 1989, with an indicated bid opening date of March 10 (although due to delayed issuance the IFB provided for bid opening on March 24). On February 9, the agency sent a request to each Forest Service contracting officer in the region to provide the names and addresses of all CWN operators under current or prior-year helicopter services agreements, so that they might be placed on a bidders list. On February 24, when the IFB was issued, it was mailed to 46 prospective bidders, not including Transwestern, which had not been included on the bidders list. Twenty-five firms submitted timely bids.

Transwestern asserts that, as an incumbent (i.e., one of several prior year contractors), it improperly was not

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furnished a copy of the IFB, a result, the firm further alleges, of the agency's failure to follow its established procedures for soliciting bids. In this regard, a January 13, 1989, memorandum from the agency's Director of Administrative Services, sent to known interested firms, including Transwestern, advised that the Small Business Administration had developed a nationwide small business bidders list (called Procurement Automated Source System (PASS)), and that as of October 1, 1986, all national forests in Region 6 would be using this list for determining the bidders who would be receiving presolicitation notices and solicitation packets. According to the memorandum, no other bidders lists would be maintained by national forests in the region. Transwestern asserts that, had the Forest Service used the PASS rather than compiling its own list, Transwestern would have been included automatically on the bidders list here, and concludes that its failure to receive a solicitation package was due either to the agency's use of improper procedures, or its negligence in assembling its own list.

In view of the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a)(1)(A) (Supp. IV 1986), which makes full and open competition the standard for conducting government procurements, we give careful scrutiny to an allegation that potential bidders have not been provided an opportunity to compete for a particular contract. Rut's Moving & Delivery Service Inc., 67 Comp. Gen. 240 (1988), 88-1 CPD ¶ 139. In so doing, we will consider that the agency has met its obligation if it can show that the agency made a diligent, good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solicitation materials, and it obtains reasonable prices. Id. While significant deficiencies on the part of the agency that contribute to a firm's failure to receive a solicitation may result in our finding that the CICA mandate for full and open competition was not met, see Dan's Moving & Storage, Inc., B-222431, May 28, 1986, 86-1 CPD ¶ 496, the fact that mistakes occur in this process will not in all cases be grounds for disturbing the procurement. See NRC Data Systems, 65 Comp. Gen. 735 (1986), 86-2 CPD ¶ 84.

Also, while agencies generally must solicit their satisfactorily performing incumbent contractors, Federal Acquisition Regulation (FAR) §§ 14.203-1, 14.205-1, 14.205-4; Abel Converting Co., 67 Comp. Gen. 201 (1988), 88-1 CPD ¶ 40, we will not require an agency to resolicit whenever the agency contributes to an incumbent's failure to receive solicitation materials in a timely manner; not only would this be inefficient from the government's perspective, but the

integrity of the system would be undermined if the other bidders could not rely on the finality of bid closing dates. NRC Data Systems, 65 Comp. Gen. 735, supra. Rather, we will look to the facts and circumstances of each case to determine whether full and open competition was achieved.

We find that the agency's efforts to obtain competition here, and the competition actually generated, satisfied the full and open competition standard; the Forest Service had a synopsis published in the CBD and mailed copies of the IFB to all 46 firms on what it reasonably believed (based on its efforts to update the list by requesting names and addresses from agency contracting officers) was a current and complete bidders list. It is not apparent why Transwestern was omitted from the list, but there is no evidence, and Transwestern does not allege, that the omission was deliberate or otherwise knowing. Further, the Forest Service received 25 bids in response to the IFB and the agency considers the bid prices received sufficient to meet its needs at reasonable prices; again, Transwestern has not alleged or shown otherwise.

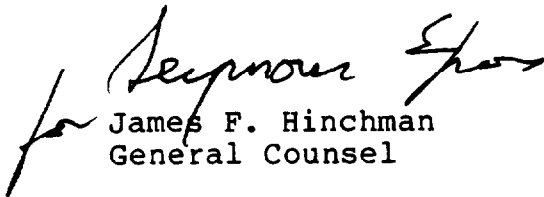
Transwestern's protest is based on its view that it should have automatically been solicited here by virtue of its inclusion on the PASS. However, while an agency may make efforts to facilitate firms' receiving solicitations in which they are interested, it remains primarily the potential bidder's responsibility to make a reasonable effort to obtain a solicitation. Where, as here, a contracting agency has properly synopsized the proposed procurement in the CBD, a potential offeror, even an incumbent contractor, is on constructive notice of the solicitation and its contents and has a duty to make reasonable efforts to obtain copies of the solicitation. Rut's Moving & Delivery Service Inc., supra. Thus, although a potential offeror may have an expectation that it will receive a certain solicitation package, the firm is not relieved of the responsibility for reviewing the CBD for synopses of procurements in which it might be interested, and making its interest in the procurement known to the agency by requesting a copy of the solicitation. Mistakes in sending solicitation packages to those who ought to receive them do occur; the prospective offeror is in the best position to take steps to assure that it receives all solicitation packages in which it has an interest.

Transwestern cites Abel Converting, Inc. v. United States, 679 F. Supp. 1133 (D.D.C. 1988), in support of its position that an agency fails to achieve full and open competition, and a procurement is defective, where it fails to solicit a potential offeror. The court in Abel, however, held only

that the agency's failure to solicit a firm had resulted in inadequate competition where only two bids were received. Here, 25 bids were received, which clearly constitutes adequate competition. Thus, the decision in Abel is inapposite here.

We conclude that the Forest Service made reasonable efforts to send the solicitation to all responsible bidders, and that its inadvertent failure to send Transwestern a copy did not result in a lack of full and open competition. Consequently, we do not think it appropriate to disturb the procurement process by recommending that the requirement be resolicited.

The protest is denied.

for
James F. Hinchman
General Counsel